[Cite as *Pate v. Quick Solutions, Inc.*, 2011-Ohio-3925.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Joseph D. Pate,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-767 (C.P.C. No. 09CVH03-4803)
Quick Solutions, Inc.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on August 9, 2011

Harris, McClellan, Binau & Cox, P.L.L., and *Mark S. Coco*, for appellant.

Dinsmore & Shohl, LLP, and *Jan E. Hensel*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Plaintiff-appellant, Joseph D. Pate, appeals from a judgment of the Franklin County Court of Common Pleas in favor of defendant-appellee, Quick Solutions, Inc. ("QSI"). For the following reasons, we reverse the grant of summary judgment to QSI on Pate's breach of contract claim, and we remand this matter to the trial court for further proceedings.

{¶2} QSI provides other companies with information technology consulting, staffing, and solutions services. In September 2003, QSI hired Pate as vice president of

sales and marketing, and QSI and Pate entered into a written agreement which set forth the terms of Pate's employment. With regard to Pate's compensation, the agreement provided that:

> Employer and Employee agree that during the term of the Employee's employment, Employee shall receive as compensation for Employee's services [o]ne hundred twenty thousand dollars ($120,000) per year as base salary. Additionally, Employee will be entitled to a one time [t]wenty thousand dollar ($20,000) deferred signing bonus to be paid after four months of employment. Other cash and stock bonuses shall be paid in accordance with the attached "Bonus Calculation Model." All stock transactions will be made within the guidelines established by legal counsel and attached to this agreement within 60 days of execution. The amounts of compensation are subject to change upon subsequent review by Employer.

Additionally, the agreement categorized Pate as an at-will employee, who was "employed at the pleasure of Employer and [could] be dismissed at any time with or without notice and with or without cause."

{¶3} The Bonus Calculation Model attached to Pate's employment agreement entitled Pate to an annual cash bonus based partially on QSI's annual sales growth and partially on QSI's annual earnings before interest, taxes, depreciation, and amortization ("EBITDA"). The model included multiple, progressively higher levels of annual sales growth and EBITDA, with the amount of Pate's cash bonus increasing with each level QSI attained. The model also accorded Pate bonuses of 500 shares of stock and 1,000 shares of stock if QSI achieved certain levels of annual sales growth. Finally, the model set "milestone" levels of annual sales, which, if exceeded, would entitle Pate to 5,000 shares of QSI stock.

{¶4} Based on QSI's 2004 sales growth and EBITDA, Pate earned only a $9,000 cash bonus under the Bonus Calculation Model.[1] However, to award Pate for his hard work and good performance, Thomas Campbell, then QSI's president, increased Pate's 2004 cash bonus to $37,500. Also, Campbell raised Pate's annual salary to $150,000, effective January 1, 2005.

{¶5} At some point in late 2004, Campbell and Pate began discussing changing the formula for calculating Pate's annual cash bonus. In January 2005, Pate devised and proposed to Campbell a new cash bonus plan. Campbell neither agreed to nor rejected Pate's proposal. Over the next three-and-a-half years, Campbell and Pate attempted without success to arrive at an alternate method for calculating Pate's annual cash bonus.

{¶6} In the meantime, QSI sporadically paid Pate lump-sum installments on his total annual cash bonuses during each year. Campbell authorized these payments in varying amounts at various times in 2005, 2006, 2007, and 2008.

{¶7} According to Campbell, as of January 2005, the Bonus Calculation Model no longer governed Pate's cash bonus. Instead, Campbell exercised complete discretion over whether Pate would get a cash bonus and the amount of that bonus. Pate, however, believed that the Bonus Calculation Model continued to control. Pate accepted the bonus installments he received in 2005 through 2008 as advances on the annual cash bonuses owed to him under the Bonus Calculation Model.

{¶8} Under Pate's calculation, the cash bonus payments that he received in 2005, 2006, and 2007 fell short of the amounts due for each year under the Bonus

[1] QSI disagrees with Pate's interpretation of the Bonus Calculation Model and his computation of the annual bonuses that he claims under it. However, for the purposes of summary judgment and this appeal, QSI concedes that Pate's computations are correct.

Calculation Model. Also, Pate never received the 2,000 shares of stock that he claimed the Bonus Calculation Model allocated to him based on QSI's sales growth in 2005, 2006, and 2007. Pate did not complain about these deficiencies because he had seen Campbell react negatively to other employees who had demanded bonuses owed to them.

{¶9} QSI's 2007 sales exceeded $25,000,000, a milestone which entitled Pate to a 5,000-share stock bonus under the Bonus Calculation Model. Although Campbell raised Pate's salary to $165,000 in December 2007, he did not initiate the transfer of 5,000 shares of stock to Pate.

{¶10} In April 2008, Campbell discovered that Pate had exhibited aggressive and hostile behavior in the workplace. A subsequent investigation revealed that Pate had made inappropriate comments to and about his female subordinates. Campbell terminated Pate's employment on June 16, 2008.

{¶11} On March 31, 2009, Pate filed a complaint against QSI, asserting claims for age discrimination and breach of contract. Pate premised his breach of contract claim on QSI's alleged failure to pay him the full amount of the cash and stock bonuses owed to him under the Bonus Calculation Model.

{¶12} After completing discovery, QSI moved for summary judgment on both of Pate's claims. The trial court granted QSI summary judgment on Pate's breach of contract claim, but it denied QSI summary judgment on Pate's age discrimination claim. After a trial, a jury found that age was not a determining factor that prompted QSI to terminate Pate's employment. Based on its entry of summary judgment on the breach of

contract claim and the jury's verdict on the age discrimination claim, the trial court entered final judgment in QSI's favor on July 22, 2010.

{¶13} Pate now appeals from the July 22, 2010 judgment, and he assigns the following error:

> The Trial Court Erred When It Granted Quick Solution[s], Inc.'s Motion for Summary Judgment Dismissing Joseph D. Pate's Breach of Contract Claim for Stock and Cash Bonuses.

{¶14} Appellate review of summary judgment motions is de novo. *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 548, 2001-Ohio-1607. " 'When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court.' " *Abrams v. Worthington*, 169 Ohio App.3d 94, 2006-Ohio-5516, ¶11 (quoting *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100, 103). Civ.R. 56(C) provides that a trial court must grant summary judgment when the moving party demonstrates that: (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made. *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶6.

{¶15} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation

that the nonmoving party has no evidence to prove its case. Id. Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. Id. If the moving party meets this initial burden, then the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. Id.

{¶16} Pate first argues that the trial court erred in granting QSI summary judgment on his claim that QSI breached the employment agreement when it failed to pay him the full cash bonuses owed to him under the Bonus Calculation Model for 2005, 2006, and 2007. We agree.

{¶17} With regard to the cash bonus, the trial court focused its analysis on the provision of the employment agreement that reserved for QSI the power to change the amount of Pate's compensation upon subsequent review. The trial court found that QSI had exercised this authority by abolishing the Bonus Calculation Model and substituting discretionary bonuses. Because Pate never raised any objections to the discretionary bonuses that he received, the trial court determined that Pate had acquiesced to this change. Pate's acquiescence prohibited him from recovering for QSI's failure to pay the cash bonuses due under the Bonus Calculation Model.

{¶18} Pate was an at-will employee. An at-will employment relationship is contractual in nature. *Lake Land Emp. Group of Akron, LLC v. Columber*, 101 Ohio St.3d 242, 2004-Ohio-786, ¶17. "In such a relationship, the employee agrees to perform work under the direction and control of the employer, and the employer agrees to pay the

employee at an agreed rate." Id. Because an employer in a pure at-will employment relationship may legally terminate the relationship at any time and for any reason, "[i]t follows that [ ] an employer * * * may propose to change the terms of [the] employment relationship at any time." Id. at ¶18. See also *Carter v. Warner Interior, Inc.* (Nov. 6, 1997), 8th Dist. No. 71797 (holding that an employer can implement a "prospective[ ] change [of] the terms and conditions of the at-will employment contract"); *Paglia v. Heinbaugh* (Feb. 25, 1994), 11th Dist. No. 93-T-4838 (same); *Nichols v. Waterfield Financial Corp.* (1989), 62 Ohio App.3d 717, 719 (same). Thus, the term of Pate's employment agreement cautioning him that "[t]he amounts of compensation are subject to change upon subsequent review" corresponds with QSI's authority under the common law to initiate a modification to the terms of Pate's at-will employment. The question for this court's review, then, is whether the record contains sufficient, uncontroverted evidence that QSI decided to modify Pate's bonus plan.

{¶19} The parties do not dispute that they originally agreed that Pate would earn bonuses in accordance with the Bonus Calculation Model. QSI asserts that it discarded that model in favor of discretionary bonuses in January 2005, and it directs this court to Campbell's testimony as support for this assertion. In an affidavit attached to QSI's motion for summary judgment, Campbell testified that after January 2005, "the Bonus Calculation Model that had been attached to Mr. Pate's Employment Agreement was no longer in effect, and Mr. Pate was paid bonuses in my discretion." Campbell affidavit, at ¶12. This statement is consistent with Campbell's deposition testimony that he and Pate "renegotiated [Pate's bonus compensation to] the point to where it would be a discretionary bonus plan." Campbell deposition, at 142. However, Campbell appears to

contradict both of these statements elsewhere in his deposition. After Campbell admitted that he had calculated Pate's cash bonus under the Bonus Calculation Model for 2005, 2006, and 2007,[2] Pate's counsel asked why he made those calculations. Campbell answered, "[w]ell, because, I mean, I don't know. That was the plan that was in place." Id. at 125.

{¶20} When considering whether summary judgment is appropriate, a court must construe the evidence in the nonmoving party's favor. *Kaminski v. Metal & Wire Products Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, ¶103. Reading Campbell's deposition in a light most favorable to Pate, we conclude that Campbell testified inconsistently regarding whether QSI implemented a change in Pate's bonus plan. Although Campbell testified that renegotiations led to the adoption of a discretionary bonus plan, he also indicated that the Bonus Calculation Model was "in place" throughout Pate's employment.

{¶21} In contrast to Campbell, Pate testified definitively that QSI never modified his bonus plan. Pate acknowledged that he and Campbell had discussed changing the Bonus Calculation Model, but Pate stated that those negotiations never resulted in the adoption of a new method for determining his cash bonus. Given the conflicting and inconsistent evidence in the record, we conclude that a genuine issue of material fact remains regarding whether QSI decided to modify how it determined Pate's cash bonus.

{¶22} Moreover, even if QSI initiated a modification, Pate had to accept the modification for it to become a term of the parties' contractual relationship. Generally, a party to an existing contract can modify that contract only with the assent of the other

[2] Campbell later retracted part of this testimony, stating that he did not know if he calculated Pate's 2007 cash bonus using the Bonus Calculation Model. Id. at 127.

party to the contract. *Hanna v. Groom*, 10th Dist. No. 07AP-502, 2008-Ohio-765, ¶27. Modifications of at-will employment contracts also require assent. *Becker v. Rapidigm, Inc.* (Sept. 28, 2005), S.D.Ohio No. 1:03CV875; *Bolling v. Clevepak Corp.* (1984), 20 Ohio App.3d 113, paragraph one of the syllabus.

{¶23} In an at-will employment relationship, an employer may unilaterally decide to modify the terms of employment. *Columber* at ¶18. Upon notification of the modification, the employee ultimately has two choices: quit or accept the new terms.[3] Id. An employee who continues working after receiving notice of the changed terms has assented to the modification. *Dantz v. Am. Apple Group, LLC* (C.A.6, 2005), 123 Fed.Appx. 702, 708; *Rupert v. Blue Cross & Blue Shield of Northwest Ohio* (Feb. 28, 1997), 6th Dist. No. L-96-222; *Johnson v. Norman Malone & Assoc., Inc.* (Dec. 20, 1989), 9th Dist. No. 14142; *Bolling* at 119. This rule is consistent with the rule adopted by most courts that have considered the issue. See *Gebhard v. Royce Aluminum Corp.* (C.A.1, 1961), 296 F.2d 17, 19 ("By continuing to work, plaintiff, knowing the newly proposed terms, accepted them as a matter of law."); *Malone v. Am. Business Information, Inc.* (2002), 264 Neb. 127, 135 ("Under either an at-will employment relationship or a contractual arrangement that allows employer modification at will, an employer can alter the terms of compensation, provided the employer has given notice of the alteration to the employee and the employee thereafter continues his or her employment."); *Dallenbach v. Mapco Gas Products, Inc.* (Iowa 1990), 459 N.W.2d 483, 487 ("[A]n employee's decision

[3] In such a situation, an employee also may attempt to negotiate more favorable terms. See, e.g., *Whisman v. Ford Motor Co.* (C.A.6, 2005), 157 Fed.Appx. 792, 801 ("When [the employer] changed the compensation terms of the plaintiffs' at-will employment, the plaintiffs' proper remedy was not to sue for breach of contract; it was to attempt to negotiate a more favorable benefits and compensation package, or quit."). However, if the employer refuses to negotiate or adopt different terms, the employee must quit or accept the employer's terms.

to continue work after an announced change in the terms of employment is an acceptance of the new terms as a matter of law."); *Arnt v. First Union Natl. Bank* (2005), 170 N.C.App. 518, 526 ("If the employer modifies the terms of an employed, at will; and, the employee knows of the change, the employee is deemed to have acquiesced to the modified terms, if he continues in the employment relationship.") (emphasis omitted); *DiGiacinto v. Ameriko-Omserv Corp.* (1997), 59 Cal.App.4th 629, 637 ("[T]he majority line of cases supports the proposition that as a matter of law, an at-will employee who continues in the employ of the employer after the employer has given notice of changed terms or conditions of employment has accepted the changed terms and conditions.").

{¶24} Importantly, continuation of employment after a modification only constitutes assent if the employer notifies the employee of the modification or the employee otherwise knows of it. *Hathaway v. Gen. Mills, Inc.* (Tex. 1986), 711 S.W.2d 227, 229; *Kauffman v. Internatl. Brotherhood of Teamsters* (D.C.App. 2008), 950 A.2d 44, 47-48; *Martin v. Golden Corral Corp.* (Fla.App. 1992), 601 So.2d 1316, 1317. "Without notice of the modified terms, it is impossible for an at-will employee to accept them." *Silva v. Md. Screen Printers, Inc.* (Oct. 26, 2006), M.D.Pa. No. 1:04-CV-2018.

{¶25} In the case at bar, there is no direct evidence as to whether Campbell actually notified Pate that QSI was replacing the Bonus Calculation Model with a discretionary bonus plan. Lacking direct evidence, QSI urges this court to infer Pate's knowledge of and assent to the discretionary bonus plan from his acceptance of the cash bonuses that QSI paid him. We, however, cannot draw this inference in light of Pate's testimony. Pate admitted to receiving cash bonus payments, but he accepted those payments believing that the Bonus Calculation Model still governed the amount of his

bonus. Pate perceived the 2005, 2006, and 2007 payments to be advances on the amounts due for each year under the Bonus Calculation Model. Given the scant and conflicting evidence regarding whether Pate received notice of or otherwise knew of the alleged change to his cash bonus plan, we find that a genuine issue of material fact exists regarding whether Pate accepted the change.

{¶26} If the trier of fact determines that Pate received notice of or otherwise knew of the alleged modification, then Pate's continued employment after the modification constitutes acceptance of it. As a consequence of such a finding, Pate could not recover for breach of contract because such a modification would nullify QSI's obligation to pay Pate cash bonuses due under the Bonus Calculation Model. If, on the other hand, the trier of fact determines that Pate did *not* receive notice or otherwise knew of the modification, then Pate's actions do *not* demonstrate assent to the discretionary bonus plan. Upon reaching such a determination, the trier of fact would then have to decide whether Pate proved any damages resulting from QSI's alleged failure to pay him the cash bonuses in accordance with the Bonus Calculation Model.

{¶27} QSI, however, argues that a trier of fact should never get the opportunity to decide this question because the evidence submitted on summary judgment establishes that Pate did not suffer any damages. In asserting this argument, QSI does not contest Pate's contention that he earned $190,500 in cash bonuses under the Bonus Calculation Model from 2004 to 2007.[4] Nor does QSI contest that it only paid Pate $144,480 in cash

[4] All calculations exclude a $20,000 signing bonus that QSI remitted to Pate in 2004 pursuant to the terms of Pate's employment agreement.

bonuses from 2004 to 2008. Given these concessions, the evidence establishes that QSI still owes Pate at least $46,020 ($190,500 - $144,480 = $46,020).[5]

{¶28} To avoid this result, QSI incorporates the amount of Pate's annual salary into the damages calculation. QSI adds the cash bonuses that Pate received ($144,480) to Pate's salary from 2004 to 2007 ($570,000), and compares that "[a]ctual compensation" total to an amount that QSI characterizes as "[a]ppellant's claim."[6] Appellee's brief, at 3. QSI computes "[a]ppellant's claim" by adding the amount that Pate asserts that he earned in cash bonuses ($190,500) to his salary for each year, *without giving Pate any credit for the $30,000 raise that QSI gave Pate in 2005* ($480,000). By ignoring the 2005 raise, QSI creates a $43,980 difference between Pate's "[a]ctual compensation" and the amount that QSI characterizes as "[a]ppellant's claim" (($144,480 + $570,000) – ($190,500 + $480,000) = $43,980).[7] Essentially, QSI offsets the amount of the raise over three years ($90,000) against the amount that Pate actually claims in damages ($46,020), and it asserts that it overpaid Pate $43,980 ($90,000 – $46,020 = $43,980). Based on these calculations, QSI contends that Pate did not suffer any damages as a result of its failure to pay him the full amount of cash bonuses due under the Bonus Calculation Model.

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[5] Due either to arithmetic or scrivener's error, Pate asserts in his appellate brief that his damages amount to $46,200, not $46,020.

[6] Actually, QSI also included Pate's 2008 salary in its calculation. However, QSI failed to attribute any salary to Pate for 2008 in the "[a]ppellant's claim" column. To be equitable, QSI should have allocated to Pate a prorated salary for 2008 based on a $120,000 annual salary. We have removed all 2008 salary from the equation to rectify the inequity in QSI's calculation.

[7] The numbers set forth in QSI's appellate brief inflate the difference to $126,400. This larger difference results from mathematical error in calculating Pate's 2004 compensation and the addition of Pate's 2008 salary.

{¶29} To find in QSI's favor, we would have to accept its inclusion of Pate's salary in the calculation of Pate's damages. We decline to do so. Although salary and cash bonuses are both compensation, as set forth in the employment agreement, they constituted separate and discrete components of Pate's compensation. In his complaint (and later in his amended complaint), Pate based his breach of contract claim solely on QSI's failure to remit to him all the bonus payments due to him. Amended complaint, at ¶10-12; complaint, at ¶10-12. Consequently, to receive summary judgment in its favor, QSI had to demonstrate the absence of evidence that Pate suffered damages proximately resulting from the breach of the cash bonus term. See *Meyer v. Chieffo*, 10th Dist. No. 10AP-683, 2011-Ohio-1670, ¶34 ("A breaching party is liable for the damages proximately resulting from the breach."). Because Pate's salary plays no role in determining the amount of Pate's cash bonus, the amounts that QSI paid Pate in salary are irrelevant in a determination of the amount of damages that proximately resulted from the breach of the cash bonus term.

{¶30} Moreover, QSI cannot now use a raise that it voluntarily instituted to escape liability for breaching the cash bonus term of Pate's employment agreement. QSI modified the salary term of Pate's employment, and Pate assented to that modification by continuing to work after receiving paychecks that reflected the increased salary. *Dantz* at 708; *Rupert*; *Johnson*; *Bolling* at 119. The terms of Pate's employment, therefore, included both the $150,000 salary and the cash bonus. QSI's argument seeks to excuse the alleged breach of one contractual obligation (to pay a cash bonus under the Bonus Calculation Model) with the fulfillment of another contractual obligation (to pay Pate a

$150,000 salary). However, QSI's compliance with one contractual provision is not a defense to the alleged breach of a different contractual provision.

{¶31} In addition to challenging the trial court's summary judgment ruling regarding the cash bonus, Pate also contends that the trial court erred in granting QSI summary judgment on his claim that QSI breached the stock bonus term of the employment agreement. We agree.

{¶32} The trial court granted QSI summary judgment because it found that Pate could not prove that QSI's alleged breach of the stock bonus term of the employment agreement caused him any injury. As we stated above, the employment agreement provided that "[a]ll stock transactions will be made within the guidelines established by legal counsel and attached to this agreement within 60 days of execution." No guidelines were ever attached to the employment agreement. Nevertheless, QSI presented testimony from James A. Rutledge, a QSI attorney, that the Delta Stock Plan governed the transfer of bonus stock to Pate. Based upon that testimony, the trial court applied the terms of the Delta Stock Plan to Pate. Under the Delta Stock Plan, termination of employment constituted a "triggering event" that required an employee to surrender all stock back to QSI. Consequently, the trial court determined that QSI's failure to transfer bonus stock to Pate did not damage him because the Delta Stock Plan would have obliged Pate to surrender that stock when QSI terminated his employment in June 2008.

{¶33} When presented with an issue of contractual interpretation, a court's primary objective is to give effect to the intent of the parties to the contract. *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, ¶9. The court must presume that the intent of the parties resides in the language they chose to employ in the contract. Id.; *Holdeman*

v. Epperson, 111 Ohio St.3d 551, 2006-Ohio-6209, ¶12. In the case at bar, the employment agreement unambiguously entitles Pate to "stock bonuses" that "shall be paid in accordance with the attached 'Bonus Calculation Model.' " The agreement is silent, however, on how QSI must convey the stock bonuses to Pate. Although the agreement requires QSI to transfer the stock "within the guidelines established by legal counsel and attached to this agreement," QSI never made any guidelines part of the parties' agreement.

{¶34} "[I]f a term cannot be determined from the four corners of a contract, factual determination of intent or reasonableness may be necessary to supply the missing term." *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322. The parties may rely on evidence extrinsic to the contract to explain what the parties intended the missing term to state. Id.; *Williams v. Spitzer Autoworld Canton, L.L.C.*, 122 Ohio St.3d 546, 2009-Ohio-3554, ¶30. The introduction of extrinsic evidence in such a situation is an exception to the parol evidence rule, which prohibits the admission of understandings or negotiations that occurred before or while the parties reduced their agreement to final written form. *Bellman v. Am. Internatl. Group*, 113 Ohio St.3d 323, 2007-Ohio-2071, ¶7; *Ed Schory & Sons, Inc. v. Society Natl. Bank*, 75 Ohio St.3d 433, 440, 1996-Ohio-194.

{¶35} While the parol evidence rule applies to completely or fully integrated contracts, it does not apply to partially integrated contracts. *Williams* at ¶28, 30; *Miller v. Lindsay-Green, Inc.*, 10th Dist. No. 04AP-848, 2005-Ohio-6366, ¶37-38. A contract is partially integrated if the parties adopt it as a final expression of only one portion of a larger agreement, making the contract incomplete. *Miller* at ¶37. A party may introduce

extrinsic evidence to supplement, but not vary or contradict, the written terms of a partially integrated contract. Id. at ¶38; *Williams* at ¶28, 30.

{¶36} Because Pate's employment agreement omitted the guidelines for the transfer of the bonus stock, it was only partially integrated. Thus, we conclude that the trial court could look to extrinsic evidence to determine how the parties intended the payment of the stock bonuses to occur.

{¶37} As we stated above, the trial court relied on Rutledge's testimony to find that the parties intended the Delta Stock Plan to govern the conveyance of any bonus stock. According to Rutledge, "the language of the Employment Agreement between Mr. Pate and QSI which states that 'all stock transactions will be made within the guidelines established by legal counsel' refers to the Delta Stock Plan and [ ], had Mr. Pate earned a stock bonus during his employment with QSI, any stock transaction that would have made QSI stock available to Mr. Pate would have been pursuant to that Delta Stock Plan."[8] Rutledge affidavit, at ¶8. Pate, however, presented conflicting evidence as to the parties' intentions. Pate testified that "[n]either Mr. Campbell, nor anyone else, ever showed [him] a copy of * * * the Delta Stock [P]lan [or] discussed it with [him]." Pate affidavit, at ¶5. Pate also pointed out that the Delta Stock Plan is a stock purchase plan, not a bonus plan. Id. at ¶6. Because "[t]he discussions that led to [his] employment contract never related to any purchase of [QSI] stock * * * [but instead] concerned [him] being awarded stock as a bonus if certain sales levels were achieved," Pate asserted that

[8] Pate attacks Rutledge's testimony as mere opinion. Rutledge, however, testified to the foregoing "[b]ased on [his] own personal knowledge as counsel for QSI." Rutledge affidavit, at ¶8.

the parties did not intend Delta Stock Plan to control the transfer of bonus stock to him. Id.

{¶38} Although the trial court included Pate's testimony while recapitulating the parties' arguments, it disregarded that testimony in its final analysis. We conclude that the trial court erred in not considering Pate's testimony. As Pate's testimony conflicts with Rutledge's testimony, a genuine issue of material fact remains regarding whether the parties intended the Delta Stock Plan to guide the transfer of bonus stock.[9] If a trier of fact concludes that the Delta Stock Plan did not apply to Pate, then Pate would not have had a contractual obligation to return the bonus stock that he claims he should have received from QSI. Consequently, the trial court erred in concluding that Pate suffered no damages from QSI's failure to transmit to him the stock bonuses that he allegedly earned.

{¶39} In a final argument in support of the trial court's award of summary judgment to it, QSI contends the doctrine of estoppel precludes Pate from all recovery for breach of contract. We disagree.

{¶40} Generally, " '[a]n estoppel arises when one is concerned in or does an act which in equity will preclude him from averring anything to the contrary.' " *Doe v. Archdiocese of Cincinnati*, 116 Ohio St.3d 538, 2008-Ohio-67, ¶7. A court should apply

[9] In so ruling, we recognize that generally a non-moving party cannot avoid summary judgment by submitting an uncorroborated and self-serving affidavit that contains nothing more than bare contractions of the evidence the moving party offered. *White v. Sears, Roebuck & Co.*, 10th Dist. No. 10AP-294, 2011-Ohio-204, ¶8. However, a non-moving party may defeat a motion for summary judgment with his own affidavit if it is made on personal knowledge, sets forth facts as would be admissible in evidence, and shows affirmatively that the affiant is competent to testify to the matters stated in the affidavit. *Wolf v. Big Lots Stores, Inc.*, 10th Dist. No. 07AP-511, 2008-Ohio-1837, ¶12; *Morantz v. Ortiz*, 10th Dist. No. 07AP-597, 2008-Ohio-1046, ¶16; *Stone v. Cazeau*, 9th Dist. No. 07CA009164, 2007-Ohio-6213, ¶16. Here, Pate presented such evidence. Because Pate's affidavit testimony conflicts with the affidavit testimony presented by QSI on the question of the parties' intent, summary judgment is inappropriate. See *Stone* at ¶17 (reversing a grant of summary judgment when the testimony in the affidavits of the opposing parties conflicted).

doctrine of estoppel so as to promote the ends of justice. Id. at ¶11. Applying these principles, Ohio courts have recognized that estoppel prohibits a party who accepts the benefits of a contract from denying the obligations imposed on it by that same contract. *Dayton Securities Assoc. v. Avutu* (1995), 105 Ohio App.3d 559, 563. See also *Hampshire Cty. Trust Co. v. Stevenson* (1926), 114 Ohio St. 1, 16 (" '[A] party actively affirming a transaction such as a contract or a purchase, by receiving and retaining money upon it, is estopped thereafter to deny the force of any of its express or implied terms or conditions.' "); *RWS Bldg. Co. v. Freeman*, 4th Dist. No. 04CA40, 2005-Ohio-6665, ¶19 (holding that equity does not permit a party " 'to retain the benefits of a contract and at the same time repudiate it or reject its burdens' "); *Ohio Bank v. Beltz*, 3d Dist. No. 8-02-13, 2002-Ohio-4886, ¶27 (same).

{¶41} Here, QSI argues that Pate is estopped from claiming that the Bonus Calculation Model entitles him to cash and stock bonuses because he accepted two salary increases and a discretionary cash bonus that exceeded the amount that QSI was contractually obligated to pay him. While Pate accepted the benefits arising from his employment relationship with QSI, he also satisfied the obligations inherent in that relationship by working under QSI's direction and control. By suing QSI for breach of contract, Pate does not seek to avoid his contractual obligations or repudiate the employment agreement, but rather to enforce the agreement and hold QSI to its contractual obligations. Thus, the goal of QSI's estoppel argument is not to prevent Pate from denying the parties' agreement. Rather, QSI is using its voluntary payment of more than the original agreement required as a justification for prohibiting Pate's recovery for

those instances where QSI paid less than the parties' agreement allegedly required. The doctrine of estoppel does not apply in this situation.

{¶42} In sum, we conclude that the trial court erred in granting QSI summary judgment on Pate's breach of contract claim. Therefore, we sustain Pate's sole assignment of error, and we reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to that court for further proceedings consistent with law and this decision.

Judgment reversed; cause remanded.

SADLER and CONNOR, JJ., concur.